No. 95-1568

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In The

Supreme Court of the United States

October Term, 1995

ANN M. VENEMAN, Secretary, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; ISLAM SIDDIQUI, Assistant Director, CALIFORNIA DIVISION OF PLANT INDUSTRY; STATE OF CALIFORNIA,

Petitioners,

vs.

PACIFIC MERCHANT SHIPPING ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is a state statute that imposes inspection fees on ocean and air carriers in foreign commerce, but not on carriers of all types in domestic interstate and intrastate commerce that are inspected at substantially higher overall cost to the state, discriminatory and violative of the Commerce Clause?

PARTIES TO THE PROCEEDINGS

The Petitioners are identified in the Petition.

The Respondent is Pacific Merchant Shipping Association, a membership corporation.

The Association's members are American President Lines, Ltd.; American Waterways Operators; ARCO Marine, Inc.; Australia-New Zealand Direct Line; Bay and Delta Towing Ltd.; Blue Star (North America) Ltd.; Chevron Shipping Co.; Columbus Line; Crowley Maritime Corp.; d'Amico Line; DSR-Senator Line Inc.; Evergreen America Corp.; Foss Maritime; General Steamship Corp.; Grancolombiana; Hanjin Shipping; Hapag-Lloyd (America) Inc.; Hyundai Merchant Marine; Inchcape Shipping Services; Italia Line; "K" Line America, Inc.; Maersk Inc.; Transportacion Maritima Mexicana; Mitsui OSK Lines (America), Inc.; Nedlloyd Lines; Neptune Orient Lines; Norsk Pacific Steamship Co.; Nippon Yusen Kaisha Line; Orient Overseas Container Line (USA) Inc.; Polynesia Line; Princess Cruises; Seaboard Shipping Co.; Sea-Land Service, Inc.; Shinwa Line; Showa Line; Steamship Association of Southern California; Star Shipping; Toko Line; USS-Posco Industries; Yang Ming Line.

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STATEMENT OF JURISDICTION

Respondent adopts the Petition's Statement of Jurisdiction.

COUNTERSTATEMENT OF THE CASE

1. California Food & Agricultural Code § 5350, enacted in 1990, imposes plant pest inspection fees on operators of vessels and aircraft entering California in foreign commerce. Section 5353 explicitly uses both a carrier's engagement in foreign commerce and a voyage or flight occurring in foreign commerce as statutory determinants for imposing the fees. Section 5353(b), in issue here, provides:

> Each commercial marine carrier *engaged in foreign commerce* which carries ... materials which are, or are likely to be, infested with any pest shall pay a fee of two hundred dollars ($200) to the director upon the arrival in this state of the carrier *on a voyage which originated outside the United States* from a country identified and listed by the director .... Cal. Food & Agr. Code § 5353(b)(emphasis supplied); *see* 3 Cal. Code of Adm. Regs. § 3560.[1]

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1. Although California Food & Agricultural Code § 5352 characterizes the fees as facility user fees, Petitioners refer to them as "inspection fees" and do not defend or describe them as user fees. *See* Petition, 7, 24. There were and are no State inspection facilities at marine terminals (which are privately operated by ocean carrier affiliates or their contractors). *See* App. 4. The Petition's statement at page 7 that the State set up and staffed some of its own inspection stations at marine terminals and airports is contradicted by the record reference cited. *See* App. 126-27 ¶ 7. Section 5353(b) inspection fees may be increased up to $600 per call or decreased by administrative action to

(Cont'd)

The Code has long subjected all vessels, aircraft, trucks and trains to both State and county inspections in all types of commerce but solely at taxpayer expense until fees were imposed by section 5353 in foreign commerce alone. *See* Cal. Food & Agr. Code §§ 403, 407-8, 434, 5023-30, 5301-5322, 5341, 5341.5; App. 22-23. Section 5350, which was part of the same legislation that adopted section 5353, provides for marine/airport inspections and related activity and applies to incoming foreign and domestic interstate commerce. The only new feature of the 1990 legislation was section 5353's inspection fees in foreign commerce, since the regulatory authority set forth in section 5350 already existed in the sections cited.

The Petition's Statement of the Case and related argument emphasize that section 5353(e) requires that the fees be used for the purposes of sections 5350 and 5353, implying that fees collected in foreign commerce are limited by law to paying expenses in foreign commerce. *See* Petition, 6, 23. However, section 5350's provisions are not limited to foreign commerce and plainly also encompass both domestic offshore commerce and commerce from the contiguous states which are subject to numerous domestic plant pest quarantines.[2] *See* 7 C.F.R. Parts 301,

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reflect changes in costs that are not limited either to inspection costs or to costs in foreign commerce. Section 5353 does not require that any inspection actually be performed for fees to apply, and there are no requirements that all vessels or aircraft be inspected.

2. Section 5350(a) provides for inspections of "conveyances entering California through airport and maritime facilities" which encompasses arrivals in domestic interstate commerce. Section 5350(b) and (e) integrate section 5350 with the inspection structure long applicable in domestic commerce by requiring the Director to maintain marine terminal and airport inspection facilities "pursuant to Section 5341" and to utilize State inspectors and other State officials to carry out section 5350. Section 5341, in turn,
(Cont'd)

318; 3 Cal. Code of Adm. Regs. §§ 3250-3285. Fees that are collected only in foreign commerce, accordingly, are not limited by section 5353(e) to payment of expenses incurred solely in foreign commerce.

Section 5350's regulatory provisions are integrated with other sections of the Code applicable to domestic commerce of all types and requiring carriers of all kinds to submit to inspection. These sections not only authorize Petitioners to perform inspections, they also require carriers and others to submit to them on pain of penalty and authorize Petitioners to seize contaminated products, promulgate quarantines,[3] impose sanctions

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authorizes inspection stations anywhere "within" California to prevent either the "introduction into, or the spread within this state, of pests. . . ." Section 5350(c) requires a public information program and does not limit the program to foreign commerce. Section 5350(d), which provides for exemptions from California inspections if other states or federal agencies agree to inspect outside California, necessarily applies exclusively in commerce from domestic origin points where these other state or federal agencies have jurisdiction and personnel. Providing an exemption procedure applicable in domestic commerce underscores that the basic regulatory provisions in section 5350(a), for which a potential exemption is provided by subsection (d), apply and were intended by the Legislature to apply to domestic interstate commerce.

3. The cited inspection provisions enforce longstanding California interior quarantine measures, adopted to interdict the intrastate movement of plant pests and pest-bearing products, extensive federal and supplementary State quarantines in domestic interstate commerce promulgated under 7 U.S.C. § 161 and federal quarantines in foreign commerce authorized by 7 U.S.C. § 160. *See* 7 C.F.R. Parts 301, 318-20; 3 Cal. Code of Adm. Regs. §§ 3250-3429. The Petition is incorrect in stating that pests or products quarantined in foreign commerce are not found in or subject to quarantines in domestic commerce. *See* Petition, 3, 10. For example, numerous pests including medfly and various other destructive fruit flies are subject to interstate and to California intrastate quarantines as well as to quarantines in

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and conduct public information programs. *See* Cal. Food & Agr. Code §§ 403, 407-8, 434, 5023-30, 5301-5322, 5341, 5341.5, 5401-6968, 16,001-16,006. Since section 5350 itself does not provide the full range of statutory powers necessary for Petitioners to enforce its inspection provisions, it depends on other sections of the Code which do.

Notwithstanding regulatory provisions that are both facially applicable and are applied to commerce of all types and to transport instruments of all types,[4] no provision of the Code imposes fees on any class of carrier or transport conveyance operating in domestic intrastate or interstate commerce, whether to recover costs of State or county inspection or information programs, general administrative overhead costs or miscellaneous program costs. Revenues from foreign commerce inspection fees imposed under section 5353, however, were expended for each of those purposes. *See* Petition, 8.

2. In addition to the Code's inconsistent approach to financing Petitioners' costs in foreign and domestic commerce,

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foreign commerce. *Compare, e.g.*, 7 C.F.R. §§ 301.64-3 - 301.64-10, 318.58; 3 Cal. Code of Adm. Regs. §§ 3250, 3252, 3256, 3258, 3406, 3412, 3414, 3417, 3422-23, 3425 *with* 7 C.F.R. §§ 319.8 - 321.1 The Petition further incorrectly implies that California's 1989 "medfly" infestation and the costly eradication thereof entered California in foreign commerce and that foreign commerce poses a unique type of threat to a highly valuable industry. *See* Petition 5. Neither the record in this case nor the public record reveals whether the 1989 medfly outbreak referenced in the Petition entered California in foreign commerce or from a domestic origin like Hawaii, which is subject to domestic medfly quarantine. *See* 7 C.F.R. § 318.13(a).

4. Such inspection authority is in fact applied to carriers of all types in both intrastate and interstate commerce. *See* Testimony of Martina Haleamau, Chief, Pest Exclusion Branch, California Department of Agriculture, Clerk's Transcript on Appeal 956-60, 964-65, 2152, 2559-60.

data of record supplied by Petitioners showed that foreign commerce fees more than paid for all variable costs of Petitioners' activities in foreign commerce subject to section 5350. Over 15 percent of total section 5353 fee revenues were used to contribute to general State and Departmental overhead costs. *See* App. 134, ¶ 10; Petition, 8. Since in domestic commerce no carriers paid fees contributing to general overhead costs the use of fee revenues from foreign commerce for general overhead necessarily had the effect of a subsidy of domestic commerce.

Petitioners' data of record further showed that costs of performing State and county inspections of transportation operations in domestic intrastate and interstate commerce were substantial and greatly exceeded both counterpart inspection costs and total costs in foreign commerce. As of Petitioners' fiscal year 1990-91, total expenses for all State inspections, exclusive of costs of vessel/aircraft inspections under section 5350, were about $9.9 million per annum, and costs of Petitioners' Pest Exclusion Branch were $10.8 million, exclusive of section 5350 costs.[5] California county costs of inspecting at "air, rail, trucking, parcel post and postal terminals" added another $9.8 million. See n.5, *supra*. Combined State/county costs of performing inspections, accordingly, were $19.7 million per annum, not including costs

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5. "[I]nspection activities, other than airport and maritime inspections, are performed by CDFA personnel at a cost of $9.92 million in the last fiscal year. County agricultural personnel also perform inspections at air, rail, trucking, parcel post and postal terminals. The cost of these activities was $9,800,036 in the last fiscal year." "[T]he total cost for operating the Pest Exclusion Branch during fiscal year 1990-91 was $10,800,647." Defendants' Response to First Set of Interrogatories, Exh. A-2 to Declaration in Support of Motion for Summary Judgment, Clerk's Transcript on Appeal, 917, 921. Related costs incurred in connection with performance of county inspections are not of record.

of vessel/aircraft inspections subject to section 5350 and were $22.1 million per annum if section 5350 inspection costs of $2.4 million per annum are included.[6] *See* App. 8 and n.5, *supra*.

For efficiency reasons, Petitioners elected to contract out the performance of marine and air inspections in foreign commerce subject to section 5350 to the United States Department of Agriculture which was already inspecting the same vessels and aircraft. *See* App. 4-7. 53 additional inspectors were employed of which 7 (13 percent) were assigned to maritime. App. 132, ¶ 5. The $2.4 million annual cost to Petitioners of section 5350 contract inspections in foreign commerce, including federal overhead, constituted about 10.9 percent of total State/county inspection costs of about $22.1 million per annum.

Maritime fee revenues were particularly high as compared to maritime inspection costs and in proportion to all related costs because both inspections and Petitioners' information program under section 5350 focused primarily on passenger traffic and hence on airports to which 46 (87 percent) of the 53 inspectors financed from revenues generated by section 5353 were assigned. *See* App. 132 ¶ 5; Testimony of Islam Siddiqui, Clerk's Transcript on Appeal 993. Petitioners' maritime inspection costs in foreign commerce were $312,000 per annum (.13 x $2,400,000) or 1.4 percent of the $22.1 million in total annual

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6. Data supplied by Petitioners below do not permit a complete and accurate comparison using full program costs because only costs of performing inspections were of record in the case of counties, and it is not clear that the $10.8 million annual cost of operating Petitioners' Pest Exclusion Branch included any allocation of State and Departmental general overhead or information program costs. However, those State/county costs identified in the record as related to inspections were at least $25.9 million per annum ($10.8 million for the Branch, $9.8+ million for counties and $4.3 million for all section 5350 costs).

State/county inspection costs. Annual maritime fees in foreign commerce produced revenues of $882,000 per annum which were 21 percent of total State revenues ($4.3 million) from all carrier inspection fees and were collected entirely in foreign commerce. These maritime inspection fee revenues were about 2.5 times Petitioners' $312,000 in annual maritime inspection costs. *See* App. 133; Petition, 8.[7]

As of January 1, 1995, Petitioners elected to terminate contract inspections in foreign commerce conducted under section 5350 and end Petitioners' associated $2.4 million in annual contract inspection costs. Petitioners' notice thereof stated that such inspections were no longer necessary. Petitioners, however, retained section 5353 inspection fees but set them at 50 percent of their prior level.[8]

Unlike inspections in foreign commerce, which are discretionary and hence involve significant variations in regulatory costs if staffing levels or the frequency of inspections is changed, California Food & Agricultural Code section 5341.5 requires that, with very limited exceptions, "every" truck

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7. If total section 5350 costs are allocated between air and maritime commerce based on the ratio of maritime to air inspection costs annual maritime fees ($882,000) were about 85% higher than all maritime costs ($559,000).

8. The January 1, 1995 action and the reasons for it were set forth in an official Departmental rule change announcement of which the California Supreme Court took judicial notice. *See* App. 7-8. Since the section 5350 contract inspection costs eliminated had been 55 percent of total costs paid from section 5353 revenues received in foreign commerce the effect of the 50 percent fee reduction, coupled with elimination of the inspection costs, was to increase funds available for other purposes by about $215,000 per annum and, of course, it enormously increased the proportion of inspection fee revenues available for purposes other than performing foreign commerce inspections.

entering California with agricultural products in domestic commerce (*see* App. 5, n.2) must be inspected and issued a certificate of passing inspection. Such non-discretionary inspections of necessity result in substantial built-in regulatory costs which increase with the growth of commerce and with inflation. Truck border inspections in domestic commerce, performed by 126 State inspectors at State quarantine inspection facilities, cost Petitioners approximately $8.4 million per annum as of 1991-2. *See* Petition, 11; App. 5, 9. That cost alone was 3.5 times the $2.4 million per annum cost of section 5350 foreign commerce inspections of maritime and air carriers combined, and it was 27 times the $312,000 annual cost of the maritime inspections.[9]

3. Participation in domestic interstate or intrastate ocean and air commerce is limited by law to United States citizens. Particularly stringent statutes limit participation in domestic waterborne commerce to vessels built in the United States that are owned and crewed by United States citizens. *See* 46 U.S.C. §§ 883, 883.1;. Domestic air commerce is restricted with very limited exceptions to United States citizens and to U.S. registered aircraft. *See* 49 U.S.C. §§ 40,102, 41,102-41,108. In consequence, California law provides for inspections without fee of carriers operating in domestic intrastate and interstate commerce to and between California ports and points which is limited by law to U.S. citizens and transport instruments. California based carriers such as Matson Navigation Co. are a subset of that class. By contrast, foreign commerce to California ports made subject to the fees is not limited to U.S. citizens or to U.S. vessels and overwhelmingly moves in foreign vessels. *See* United States Department of Transportation, Maritime

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9. Petitioners' truck inspection cost per inspector in domestic commerce ($67,000 per inspector) (*see* App. 5, 9) was about 50% higher than the $44,500 cost for each of the 53 contract inspectors in foreign commerce who carried out section 5350 prior to Jan. 1, 1995. *See* App. 4, 8.

Administration, United States Oceanborne Foreign Trade Routes, (Oct. 1992) 70-103.

4. Neither a federal statute providing for federal inspection fees nor its legislative history adverts to state agricultural inspection fees. *See* 21 U.S.C. at 136a. Neither the Petition nor the record herein indicate that either discriminatory or non-discriminatory state inspection fees were ever brought to the attention of Congress.[10]

5. The Petition's Statement of the Case inaccurately characterizes Petitioners' decision to contract with a federal agency to perform the inspection functions authorized in section 5350 as merely a "transfer of inspection fees from the State to USDA . . . formalized in" the contract between them. *See* Petition, 7. California incurred and paid for contract services rendered only so long as the contract continued. The fees were not treated by the California Legislature or by Petitioners' contract with the United States Department of Agriculture as a kind of State tax dedicated in part to support a federal function. The contract, set forth in the Appendix to the Petition, makes no reference to California's fees and hence makes no reference to any transfer of all or part of them to USDA or to any USDA entitlement to them, either temporarily, permanently or in any particular part. *See* App. 106-119.

6. Respondent Pacific Merchant Shipping Association

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10. Federal law authorizes state pest quarantines and quarantine enforcement measures but expressly limits them to domestic interstate commerce, to circumstances in which no federal quarantine is in place and to quarantine enforcement that is non-discriminatory. *See* 7 U.S.C. § 161 (second and fourth provisos). Federal law conferring federal authority in foreign commerce makes no reference to authorizing state quarantines, to their enforcement or to fees. *See* 7 U.S.C. § 160 and supplementary sections 150bb and 150ff.

("PMSA") challenged California Food & Agricultural Code § 5353(b) in state court as facially discriminatory, as discriminatory in application based on regulatory costs supplied by Petitioners, and as violative of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. Contrary to the assumption in the Petition's Statement of the Case and to related statements at pages 14, 16, 25-28 of the Petition, neither PMSA's facial challenge nor its related challenge using regulatory cost data was limited to comparing inspections of interstate trucks, which are subject to mandatory inspections at taxpayer expense under section 5341.5 of the Code, with inspections of vessels in foreign commerce, which are subject to regulatory fees under section 5353 whether or not inspected. Rather, Respondent challenged section 5350's use of transport moves and business transactions in foreign commerce as statutory determinants for imposing fees when the Code provides for — and Petitioners and California counties perform — inspections of every type of carrier operating in domestic intrastate and interstate commerce solely at taxpayer expense. *See* App. 36 and n.15 *infra*.

7. The trial court held the fees to be facially discriminatory by summary adjudication but gave Petitioners a second opportunity to articulate some constitutionally adequate justification that was relevant to the fee discrimination in issue. When no such justification was provided, the court invalidated the fees as violative of the Commerce Clause. *See* App. 2, 41.

The Court of Appeal reversed. Although that court observed that the fees would be discriminatory and "inevitably stricken down" under this Court's "waste disposal fee cases" if foreign and domestic commerce inspections had been kept within a single inspection program, the court held that Petitioners' action in contracting out inspections in foreign commerce resulted in a separate regulatory program which in turn made facial discrimination analysis and summary disposition of the

discrimination issue inappropriate under California summary adjudication practice. *See* App. 58-61.

The California Supreme Court reversed. It unanimously held section 5353(b) fees facially discriminatory under this Court's decisions. It stressed that the discrimination was more patent, extreme and unjustifiable than in cases of fees and tax invalidated by this Court. It rejected Petitioners' justifications as logically unrelated to the total discrimination in question and as constitutionally inadequate. *See* App. 19-23, 24-28, 30-41.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SETS FORTH NO GROUNDS EVEN APPROACHING THE "UNMISTAKABLY CLEAR" STANDARD THAT IS REQUISITE TO SHOW CONGRESSIONAL APPROVAL OF STATE DISCRIMINATION.

The Petition's principal claim, which was neither presented to nor passed upon by any of the state courts below (*see* App. 1-65), is that the state courts erred even in treating this case as a dormant Commerce Clause case. Petitioners assert that because Congress authorized federal vessel inspection fees limited to foreign commerce in 21 U.S.C. § 136a Congress set a federal example and further that this example should be construed as implied Congressional authorization of state fees that discriminate against foreign commerce. *See* Petition, 14-15, 17-22.

Because Petitioners did not make this constitutional claim below and instead argued only that the statute was consistent with this Court's dormant Commerce Clause standards, the new

claim is not properly before this Court and constitutes no basis for granting the writ. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2219 (1995); *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-61 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940).

As the Petition acknowledges, *Maine v. Taylor* and other cases have required that "congressional direction" to exempt state discrimination from Commerce Clause constraints must be shown to be "unmistakably clear." *Maine v. Taylor*, 477 U.S. 31, 39 (1986); *see* Petition, 20. Absent such a showing, fees like those in this case are plainly invalid under all this Court's decisions. *E.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. __, 114 S. Ct. 1345, 1353, 1354 (1994); *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 78-79, 82 (1992).

The Petition does not purport to satisfy *Maine*'s "unmistakably clear" standard for showing that Congress actually addressed and approved of state discrimination. Indeed Petitioners acknowledge that they must avoid application of the *Maine* standard. *See* Petition, 20. The Petition argues that the *Maine* standard, as applied to discrimination challenges, has been supplanted at least as to foreign commerce where Petitioners would apply a more relaxed implied consent standard. *See Barclay's Bank, PLC v. Franchise Tax Bd.*, 512 U.S. __, 114 S. Ct. 2268 (1994); Petition, 20, *see also* Petition, 14-15, 17-22. Petitioners assert that in this case Congress impliedly authorized state inspection "fee discrimination" (Petition, 17) without any showing that Congress adverted to or knew thereof, a position that goes well beyond the relaxed standard invoked and that *Barclay's* in any event carefully limited to a non-discrimination based challenge. *See* Petition, 14-15, 17-22.

Since *Barclay's* is the only case said by Petitioners to modify *Maine's* "unmistakably clear" standard as applied to discrimination challenges, *Barclay's* rejection of that linchpin assertion is necessarily fatal to Petitioners' request that the writ be granted based on the Petition's principal claim. *See* Petition, 20. *Barclay's* used standard dormant Commerce Clause discrimination analysis to address and to dispose of the discrimination claim in foreign commerce raised in that case. It did not apply the relaxed tacit congressional assent standard that Petitioners urge here. *See* 114 S. Ct. at 2276-77. Having found the tax non-discriminatory under normal dormant Commerce Clause standards, *Barclay's* addressed a further claim that even if non-discriminatory the tax was invalid because federal uniformity was required in foreign commerce. In rejecting the federal uniformity claim the Court found that Congress, by a long course of conduct in considering recommendations to ban such taxes but refraining from doing so, had demonstrated its consent.

Contrary to the Petition, *Barclay's* confirmed that, in context of *discrimination* challenges, a claim that Congress approved state discrimination must be shown with the "unmistakable" clarity required in *Maine*. Instead of displacing the *Maine* standard, as the Petition claims, *Barclay's* confirmed it in discrimination cases as follows:

> An important premise underlying both decisions [*Wardair* and *Container Corp.*] was this: Congress may more passively indicate that certain state practices do not "impair federal uniformity in an area where federal uniformity is essential" . . . [citation omitted]; it need not convey its intent with *the unmistakable clarity required to permit state regulation that discriminates against*

> *interstate commerce* or otherwise falls short under *Complete Auto* inspection. [citing *Maine v. Taylor*] 114 S. Ct. at 2282-83 (emphasis supplied).[11]

Further:

> Absent congressional approval . . . a state tax . . . will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax . . . discriminates against interstate commerce . . ." 114 S. Ct. at 2276 (emphasis supplied).

Even if a discrimination challenge could be defeated by satisfying the more relaxed standard for congressional consent applicable to federal uniformity challenges in foreign commerce the Petition does not approach satisfying that standard.

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11. The other cases cited by the Petition either involved no claim of discrimination or, as in *Barclay's*, a conclusion by this Court that no discrimination existed. *See Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 15 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 157 (1982). Further, these cases involved treaties or federal statutes that addressed the state or tribal taxes in question and imposed federal statutory or treaty standards and procedures for calling the balls and strikes to determine whether a particular tax would be permissible or prohibited. These federal uniformity cases, even if applied to discrimination challenges, would not remotely support a claim that a federal statute that does not even refer to state fees, still less authorize discriminatory state fees, somehow creates an exception to Commerce Clause anti-discrimination standards. To the contrary, *Wardair* makes clear that the standard for setting aside dormant Commerce Clause criteria based on congressional consent even in a non-discrimination context is that "the Federal Government has *affirmatively decided to permit* the States to impose these . . . taxes. . . ." (477 U.S. at 12) and has itself thereby "*struck the balance*. . . ." *Merrion*, 455 U.S. at 153. (Emphasis supplied). No claim that remotely approaches that standard appears in the Petition.

Barclay's found multiple "indicia of Congress's willingness to tolerate" nondiscriminatory unitary taxes imposed on the worldwide income of multinational corporations because, inter alia, Congress for two decades had "focused its attention on this issue" (114 S. Ct. 2285) and had repeatedly addressed and considered legislative proposals to prohibit or modify such taxes but did not enact them even though a decision of this Court had "left the ball in Congress' court. . . ." *Id.* at 2283; *see Container Corp of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

The Petition makes no claim that Congress even knew of the existence of state inspection fees of any kind, still less that it adverted to state fees imposed in a discriminatory manner, or in any way indicated its approval thereof.[12] The writ should not be granted where the Petition fails to show that the new standard the Petition urges is not met in the case before the Court.

The Petition's assertion that a federal fee imposed in foreign commerce sets an example that thereby serves as congressional approval of otherwise unconstitutional state discrimination lacks any support. This Court rejected a similar suggestion in *Kraft*. *See* 505 U.S. at 81-82. There Iowa asserted unsuccessfully that the distinction it had drawn between taxing income of Iowa taxpayers flowing from foreign subsidiaries but not income from subsidiaries in other states was non-discriminatory or was justified because, for administrative convenience, Iowa had merely followed the federal example of the Internal Revenue

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12. Even assuming that it were rational to urge that Congress had approved discriminatory state fees, otherwise precluded by the Commerce Clause, merely by authorizing a federal fee, section 136a would still fall short as the example postulated. The federal inspection fees authorized are restricted to recovering federal "costs of agricultural quarantine and inspection services". The California fees are not restricted to such costs and are collected for an expanding variety of purposes that no longer include regular inspections. *See* 21 U.S.C. § 136a(a)(1)(D); App. 7.

Code and federal regulations. Notwithstanding that federal example, the Court invalidated Iowa's tax for drawing a geographic distinction based on whether subsidiaries and their income were foreign or domestic. 505 U.S. at 81-82.

Congress, of course, is not subject to anti-discrimination proscriptions imposed on states by the Commerce Clause. Since Congress is free to discriminate but states with few exceptions are not it would be irrational to infer congressional approval of state discrimination from a mere federal example as the Petition urges. No case cited by the Petition purports to do so, and *Kraft* rejects the claim.

II.

SECTION 5353(b) IS PATENTLY DISCRIMINATORY AND NECESSARILY INVALID UNDER ALL OF THIS COURT'S DECISIONS.

The dormant Commerce Clause issues in this case do not involve any conflict between decisions of this Court or between decisions of lower courts. Although this case is of great interest to the parties it presents no unresolved or important Commerce Clause questions. It is noteworthy only because it is difficult to find cases in the reports in which the discrimination is so overt, is at such an extreme and is so bereft of credible or even relevant justification.

Oregon Waste and similar cases required the California Supreme Court to hold California Food & Agricultural Code §5353(b) facially discriminatory because it so patently makes foreign commerce a "statutory determinant" for imposing regulatory fees in foreign commerce alone. *See Oregon Waste*, 114 S. Ct. at 1350. As *Kraft* put it in addressing a state's "preference for domestic commerce over foreign commerce" or

of "business activity in the United States" over activity elsewhere, such a "statute cannot withstand . . . scrutiny, for it facially discriminates against foreign commerce and therefore violates the Foreign Commerce Clause." 505 U.S. at 78-79, 82. These decisions make this an ipso facto case.

Moreover, the discrimination in this case is at an extreme. Ocean and air carriers in foreign commerce pay what the Petition concedes are "inspection fees" that substantially exceed costs of inspections whereas in all forms of domestic commerce carriers are inspected at substantial cost, yet they pay no fees for inspection, for related regulatory costs or for general overhead.[13] *See* Petition, 7, 8, 24. As this Court said in *Hughes v. Oklahoma*, 441 U.S. 322, 337-88 (1979):

> Far from choosing the least discriminatory alternative . . . [the State has made] a choice of the most discriminatory means, even though nondiscriminatory alternatives would seem likely to fulfill the State's purported local purpose most effectively.

This Court's rulings regularly invalidate state fees and taxes in context of far more subtle discriminations justified by far more compelling public policy considerations than the naked,

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13. The Petition asserts that charging fees for domestic commerce inspections, following which individual certificates of inspection are issued to drivers, "could" cause administrative problems although why this is so remains unstated. *See* Petition, 26. Petitioners represented to the trial court and to the California Court of Appeal, without reference to any administrative difficulties anticipated, that fees for such domestic inspections were "indeed — under consideration". *See* State Defendants' Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment, Nov. 23, 1992, pp. 10, n.6, Clerk's Transcript on Appeal 2248; Opening Brief for Appellants, California Court of Appeal, p. 5.

extreme and readily avoidable discrimination in this case. *See Kraft*, 505 U.S. at 75-81; *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 337, 342-43 (1992); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-4, 279 (1988).[14] Moreover, the California statute facially discriminates in favor of intrastate California commerce and carriers, and the prohibited discrimination is effected by California counties as well as by the State in inspecting carriers in domestic commerce for free. *See Associated Industries of Missouri v. Lohman*, 511 U.S. __, 114 S. Ct. 1815, 1822 (1994).

The Petition reflects throughout a false assumption which, although irrelevant under this Court's Commerce Clause decisions, should be corrected. *See* Petition 14, 16, 25-28. Respondent's position was at no time limited to a comparison of treatment of trucks in domestic interstate commerce vis-a-vis the treatment of vessels in foreign commerce. *See* App. 17. Rather, it stressed that every type of carrier and class of commerce was subject to inspections creating regulatory costs but that only carriers in foreign commerce paid fees.[15] The Petition confuses

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14. The payment by Petitioners to the USDA for contract inspections does not serve to validate discriminatory fees simply because part of the revenues therefrom was utilized for the contract payments. Even where local quarantine fees were, by the terms of the statute adopting them, to be paid in part to the federal treasury this Court invalidated fees otherwise violative of the Commerce Clause. *New York v. Compagnie Generale Transatlantique*, 107 U.S. (17 Otto.) 59 (1883).

15. We note the California Supreme Court's statement at App. 18 that Respondent did not contend that there was discrimination vis-a-vis *intrastate* commerce, but we respectfully point out that the statement reflects an oversight. *See e.g.*, Opening Brief for Plaintiff and Respondent before the Supreme Court of California p. 18 which summarizes the facial discrimination generically challenged as favoring "domestic commerce". Respondents urged: "A vessel (or aircraft) *does* pay a fee if it arrives from Germany or

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a dramatic example of discrimination favoring trucks operating in domestic interstate commerce with the broader discrimination favoring all types of transport in domestic commerce presented by the statutory provisions in question and by Respondent's constitutional challenge.

In addressing the example of costly border inspections of trucks performed solely at taxpayer expense in domestic commerce the California Supreme Court emphasized that the thing to be compared was inspections and related regulatory services performed in each case and associated costs. It correctly rejected Petitioners' position that, in context of fees imposed on foreign commerce alone, physical differences in the transport conveyances inspected or pests sought were relevant to determining discrimination.[16] *See* App. 30-32; Petition, 25-29.

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Australia but *does not* pay a fee if it arrives from Hawaii, Florida, Puerto Rico or Guam or from *other California ports or points*, even though those places are subject to numerous domestic quarantines." (emphasis supplied); *See* Respondent's Brief, California Court of Appeal, 2, 3, 4, 13, 17. Respondent at every stage of this case urged discrimination vis-a-vis "agricultural inspections performed under the same Article of the Code of trucks, vessels and other transportation instruments potentially carrying plant pests in domestic interstate or in domestic intrastate commerce." Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Clerk's Transcript on Appeal, 1007; *See id.*, 1009, 1012, 1015, 1017-18.

16. This Court invalidated a state tax exemption for wines made from local pineapple juice when the exemption was not granted to malt or grape based beverages mainly produced outside the state. *Bacchus Imports Ltd. v. Diaz*, 468 U.S. 263 (1984). The discrimination was not excused because the products differed or were made from different plant species. Higher effective regulatory fees imposed on marine cargo vans than on local trailers have been invalidated as discriminatory. *Trailor Marine Transport Corp. v. Vasquez*, 977
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Further, claims of differences in inspection costs per unit inspected would be relevant under *Oregon Waste* and *Kraft* only to justification of discrimination and only then if different levels of fees had been imposed. If higher fees in foreign commerce are shown to reflect bona fide regulatory cost differences stemming from differences in conveyances inspected, in the pests sought or in time or cost per unit inspected, differences between vessel, aircraft and truck inspections generally asserted by Petitioners might at least be relevant as background to showing a cost justification for differences in fee amounts, but that is not this case. *See* App. 31-32; *accord, National Solid Waste Management, Inc. v. Voinovich*, 959 F.2d 590, 593-94 (6th Cir. 1992).[17] They have no relevance in this case because fees were imposed in foreign commerce alone, and Petitioners made no attempt to claim or show that costs in domestic commerce were nil or negligible.[18] *See* App. 30-32.

Finally, the unreasonable "user fee" and the older "undue burden on commerce" fee cases cited at page 27 of the Petition,

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F.2d 1 (1st Cir. 1992). Although lands are always unique higher fees for registering sales of subdivision lots in other states than for selling in-state lands have been held facially invalid. *Cranberry Hill Corp. v. Shaffer*, 629 F. Supp. 628 (N.D.N.Y. 1986).

17. It was in context of cases in which different levels of regulatory fees were challenged that this Court left open the door to allocation of regulatory costs in a manner proportional to the generation of such costs. *See Oregon Waste*, 114 S. Ct. at 1351.

18. The Petition at page 11 shows that bare inspection costs for an average truck was $30 which approaches the $43 fee per aircraft arriving in foreign commerce after January 1, 1995 even though Petitioners' inspection costs of arriving aircraft in foreign commerce are de minimis after that date. *See* App. 6, n.4.

apparently as an oblique if antique challenge to the *Oregon Waste* and *Kraft* tests, are not relevant to fee or tax discrimination challenges. None of them involved state regulatory activity and costs in all classes of commerce coupled with fees imposed only on a class of commerce protected by the Commerce Clause. *See Pure Oil Co. v. State of Minnesota,* 248 U.S. 158 (1918); *McLean & Co. v. Denver & Rio Grande R.R.*, 203 U.S. 38 (1906). Rather, they presented claims that fees were excessive and, in the older cases cited, constituted a tax exacted on interstate commerce at a time when state taxes making interstate commerce pay a fair tax share were nonetheless invalidated as burdens on commerce. As this Court made clear in *American Trucking Ass'ns v. Scheiner,* 483 U.S. 266, 290 (1987) the airport "user fees" upheld in *Evansville* and relied upon by Petitioners were only upheld because they applied to all classes of commerce and were "neither discriminatory nor excessive." *See Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). In any event Petitioners do not claim that the fees here are user fees.

III.

DISCRIMINATION AGAINST FOREIGN COMMERCE IS NOT EXCUSED BECAUSE CALIFORNIA BASED CARRIERS COMPETING IN FOREIGN COMMERCE WOULD PAY THE SAME FEES.

Petitioners assert that although section 5353 imposes fees in foreign commerce alone it lacks "protectionism" as the Petition narrowly defines that term and hence is not discriminatory. Petitioners narrowly define "protectionism" in context of this case as involving both a motive to benefit local businesses and a direct competitive relationship between local businesses benefited and out-of-state businesses burdened, *i.e.*, as "state *efforts* to economically benefit in-state interests at the expense

of out-of-state *competitors*." Petition, 22, 23-24 (emphasis supplied). Since both California based and other ocean carriers would each pay the same fees under section 5353 when competing with each other in foreign commerce, Petitioners urge simplistically that there is no "protectionism" and no discrimination even though the fees are triggered only in consequence of conducting business in foreign commerce. *Id.*

The Petition's "no protectionism/no discrimination" claim is directly at odds with three recent decisions of this Court. It also ignores patent favoritism of domestic commerce to and between California ports that is reserved by law to U.S. carriers and vessels, of which California based carriers and vessels are a predominant subset.

The Petition fails to acknowledge that Kraft holds that a higher tax, triggered by business activities in foreign commerce, is discriminatory and invalid if it facially or otherwise effects a "*preference for domestic commerce over foreign commerce*" or "*favor[s] business activity in the United States generally over business activity abroad*". 505 U.S. at 79 (emphasis supplied). That standard plainly defines discrimination in terms of favoring one class of commerce protected by the Commerce Clause over another class, as the fees in this case patently do. Contrary to the Petition *Kraft* and other cases do not require that a local and out-of-state company each compete in the same class of commerce and be differently burdened because their domicile or principal place of business is outside the state.

Kraft's formulation of discrimination was applied by the Court in context of fee discrimination against domestic interstate commerce in *Oregon Waste* and *Chemical Waste*. In those cases fees were invalidated because they used interstate movements as a "statutory determinant" for imposing higher fees, even though locally domiciled waste disposal facility fee payers competing

with waste disposal facility feepayers domiciled or having their principal place of business out-of-state would each pay the same higher fee for receiving interstate wastes and the same lower fee for receiving domestic origin wastes.[19]

Section 5353 inspection fees, imposed only on foreign commerce and imposed only by reason of business operations conducted and transport moves in foreign commerce, so plainly fall within *Kraft's* basic formulation of discrimination and the similar "statutory determinant" formulation in *Oregon Waste* that Petitioners do not trouble to contest that essential point. That should end the matter and cause the writ to be denied.

Petitioners instead set up and attack a strawman — a corollary point in *Kraft*. The corollary to *Kraft*'s formulation of discrimination is that a tax which is discriminatory because it prefers domestic commerce or business activities over foreign ones does not cease to be discriminatory or avoid invalidation if a state shows that the tax "does not favor local *interests*" or "local commerce" and, indeed, actually "places additional burdens on . . . [in-state] businesses." 505 U.S. at 78-79 (emphasis supplied); *see* Petition, 24. However, that corollary merely applies the basic rule in *Kraft* quoted earlier (and not challenged by Petitioners) in order to reject a particularized state contention.

This case does not even present the "no protectionism" issue that the Petition frames, since both "local interests" and "local commerce" in the form of carriers engaged in domestic commerce are plainly favored. Section 5353 inspection fees also

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19. *Oregon Waste* captured the essence of *Kraft*'s basic holding in ruling that the constitutional vice of the Oregon fee, triggered by a movement into Oregon in foreign commerce, was that "the statutory determinant for which fee applies to any particular shipment . . . is whether or not the waste was generated out-of-state." 114 S. Ct. at 1347.

plainly favor California based ocean carriers and transport instruments. California based vessels and carriers constitute the predominant subset of domestic commerce to and between California ports in which U.S. carriers and vessels must carry 100% of commerce.[20] *See* 46 U.S.C. §§ 883, 883.1. Oceanborne foreign commerce is subject to no restriction to U.S. carriers or vessels, other than preferences in carrying government cargo, and in foreign trades foreign carriers overwhelmingly predominate.[21]

California here elected to impose fees on the class of commerce overwhelmingly dominated by foreign carriers and in which only one California based ocean carrier plays a part. It imposed no fees in domestic commerce to and between California ports where California based carriers are predominant. Hence, the statute is "protectionist" in the sense used in the Petition as well as the broader sense used in *Kraft* and *Oregon Waste*. It favors locally based businesses and transport conveyances as well as generally favoring "domestic commerce", "local commerce" and "business activity in the

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20. Four major operators of dry cargo vessels carry virtually all that domestic commerce, and three California headquartered companies (Matson Navigation Co., American President Lines and Crowley Maritime Corp.) collectively are predominant therein. Because of administrative exemptions for tankers only dry cargo vessels are subject to California inspection fees.

21. As of 1990-91, in noncontiguous foreign trades to U.S. west coast ports U.S. carriers had only a 2% share in all trades other than the trade from Asian and Persian Gulf ports. In the trade from Asian and Persian Gulf ports to California ports all U.S. carriers, including American President Lines, the only California based carrier engaged therein, carried only 15 percent of total cargo. U.S. Department of Transportation, Maritime Administration, United States Oceanborne Foreign Trade Routes (October 1992), 65-77.

United States generally over business activity abroad", the very conduct struck down in *Kraft*. *See* 505 U.S. at 78-9.[22]

IV.

REQUIRING STATE FEES TO BE NON-DISCRIMINATORY CASTS NO "CLOUD OVER FUTURE FEDERAL-STATE COOPERATION".

The Petition's "second main reason" why the writ should be granted strains credulity. It asserts that the California Supreme Court's decision, which holds only that if State fees are adopted they must be imposed in a non-discriminatory manner or that, if discriminatory, they must be justified by genuine differences in underlying regulatory costs, somehow "may cast a dormant Commerce Clause cloud over future federal-state cooperation." Petition, 17.

The Petition fails to explain how state-federal cooperation in enforcing pest quarantines could depend on or be adversely affected by a state's inability to impose *discriminatory* state fees without a valid justification. This reason for granting the writ is nothing more than a vague general statement and does not address an issue presented by this case. Moreover, this makeweight policy claim, like Petitioner's principal constitutional claim, was neither presented to nor addressed by the California courts. Finally, federal policy as applied to federal-state cooperation in plant pest quarantine enforcement itself adopts anti-discrimination principles for states. In authorizing state authority to impose and enforce supplementary

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22. Moreover, the trucking business in domestic intrastate commerce favored by the fee structure almost certainly consists disproportionately of vehicles based and registered in California and operated by small California concerns.

state quarantines, limited to domestic interstate commerce only, Congress required that a state's exercise of such authority be on a non-discriminatory basis. *See* 7 U.S.C. § 161 (fourth proviso).

CONCLUSION

The Petition states no grounds for granting the writ. It identifies no conflict in the case law, no error of law and no reasons of policy that even suggest that this case merits review. The California Supreme Court carefully and correctly applied this Court's precedents, and the writ should be denied.

Respectfully submitted,

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